No. 2535, 2536, 2537, 2538, 2539 and 2540.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON,

Appellants,

vs.

E. THOMPSON,

Appellee.

THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON,

Appellants,

vs.

CECIL C. CARTER,

Appellee.

SUPPLEMENTAL AND CLOSING BRIEF ON BEHALF OF APPELLEES.

R. P. HENSHALL,
Merchants National Bank Bldg., S. F.
H. L. CLAYBERG,
JNO. B. CLAYBERG,
WELLES WHITMORE,
Pacific Building, San Francisco,
Solicitors for Appellees.

THE TEN BOSCH COMPANY, SAN FRANCISCO

Nos. 2535, 2536, 2537, 2538, 2539 and 2540.

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SUPPLEMENTAL BRIEF FOR APPELLEE.

1. Because of the length of appellants' original briefs in Nos. 2539 and 2540 and Nos. 2535, 2536 and 2537 and the short time at our disposal for the preparation of our briefs, we failed to insert therein any statement as to our position with reference to the point suggested on page 94 of their brief filed

in cases Nos. 2539 and 2540, namely that "no bond was required of complainants."

As we understand the law and practice of the United States Courts, it is entirely discretionary with the Court below to require a bond on the issuance of an injunction.

The rule, as established by the Courts of Appeal and the Supreme Court of the United States, is that no bond will be required upon the granting of an interlocutory injunction if the Court below is satisfied that the right of the party in whose favor it is granted, is clear, and that no serious injury will be incurred by the party against whom the injunction is issued.

Briggs v. *Neal,* 120 Fed. 224;
Russell v. *Farley,* 105 U. S. 433;
Meyer v. *Black,* 120 U. S. 206.

Evidently, Judge Bledsoe did not think that the case was one in which a bond should be required. Judging from his opinion, as printed in the record, he found that the complainants' case was clear and that no injury or damage could result to the defendants. He, therefore, properly exercised his discretion by not requiring a bond.

But again, the failure to give a bond, when the same was not ordered or conditioned by the Court below, would surely be insufficient to warrant the reversal of the orders granting the injunctions.

If this Court should be of the opinion that a bond

should have been required, in our judgment it possesses full and complete authority to direct a bond to be given by the complainants in such amount as it sees fit to require, and that a condition be attached to the order that if such bond is not filed by the complainants within a certain time limited in the order, then the injunctions should be dissolved.

In case this Court does not feel satisfied that it has jurisdiction to make such order, it would have the right, upon remitting the case to the Court below, to direct that Court to require a bond to be given.

It is difficult, however, to conceive how this Court can say that the Court below committed error in not requiring a bond, for many reasons, among which is that no suggestion was made to the Court by counsel for appellants that a bond should be required, and no demand or request for it was ever made to the Court below. Its attention was not called, in any way to the giving of a bond, and it is difficult for us to conceive how error can be charged against the Court below, when the matter, claimed to be erroneous, was not presented to the Court for consideration, and not decided by it.

See Inv. Albany W. W. v. Louisville B. Co., 122 Fed. 776 (C. C. A.).

But again, all the injunctions were made reciprocal by the order of the Court without a bond being required of or from either of the parties to the suit. (See Record, No. 2540, p. 87.)

If a bond should be required in favor of appellants one should also be required in favor of the appellees.

We submit: 1st. That this question of the giving orders appealed from should not be reversed on that be considered; 2nd. If considered by the Court the of a bond is not before the Court, and should not ground.

2. The objection to the verification is not well taken. The verification is in strict accord with Equity Rule 25. The objection, moreover, was waived by not urging it upon the Court below, which would, of course, have permitted, if the verification were found to be defective, an amended verification to be made.

As stated in the recent case of Swayne & Hoyt v. Wells Russell & Co., decided February 8, 1915, S. F. No. 6835, by the Supreme Court of the State of California, and which is reported in the Recorder of February 13th:

> "No objection to the form or sufficiency of the affidavit in this respect was made below. If it had been made, the defect could have been immediately cure if the court below had so acquired. (Code Civ. Proc., Sec. 595.) Under these circumstances it must be deemed to have been waived."

See Inv. Albany W. W. v. Louisville B. Co., *supra.*

CLOSING BRIEF ON BEHALF OF APPELLEE.

PRELIMINARY.

In these cases, we received nine days before the argument, two briefs—one 110 pages, the other 57 pages in length. It was, of course, impossible to reply to them fully before the cases came on to be heard.

Therefore, and especially in view of the fact that in the case of Pack v. Carter, No. 2538, appellants' brief was not received until *one* day before the argument, this brief is filed covering all the cases.

The six cases now on file may be conveniently divided into three classes. First, two of these cases are on appeal from orders refusing to vacate orders granting injunctions and refusing to dissolve injunctions. These are cases Nos. 2539 and 2540. Second, three cases are on appeal from orders granting injunctions, and are Nos. 2535, 2536 and 2537. Third, the last case, No. 2538, Pack v. Carter, which is differently entitled, is an appeal from an order refusing to dissolve a restraining order made prior to the return of the order to show cause. As stated at the oral argument, it is very doubtful if this order is appealable. See Judicial Code, Sec. 129.

It will be observed that the records on these various appeals are different. Thus the motion and affidavit accompanying the motion to dissolve the injunction are not before the Court in the three

cases secondly above mentioned, Nos. 2535, 2536 and 2537; while in the third case, No. 2538, the record embraces only the complaint, the restraining order, and the motion made to dissolve that order, together with the affidavits filed in support thereof.

It will be noted, therefore, in passing, that we were correct in our statement made at the oral argument, that the appellants first rested their case upon the verified bill. They offered no affidavits in response to the order to show cause issued upon the filing of the bill, and the Court, for the reason stated in its opinion, deeming the bill to be sufficient, ordered the issuance of the injunction. Having thus lost, the appellants then came again into Court and for the first time presented affidavits in which they attempted to deny certain of the allegations of the complaint. In the lower court it was stated, and properly stated, that these affidavits should have been presented upon the return day of the order to show cause. The decision below, however, was not rested upon this ground; the motion was denied on its merits.

The position of the appellees on these appeals embraces two points:

1. That the injunctions pendente lite were properly issued upon the verified complaints.

2. That the admissions contained in the affidavits presented by appellants upon their several motions

to dissolve the several injunctions, removed any doubt upon this point.

This point arises in the three cases secondly above mentioned, only, and if correct, it disposes of those cases, and, in addition, inferentially or indirectly at least, of all the cases.

ANSWER TO APPELLANTS' BRIEF.

A very brief answer is all that is necessary to the argument found in appellants' brief.

Referring to their brief in cases Nos. 2539 and 2540, it will be found that their appeal is grounded upon five points (see pp. 36 to 43) which are supposedly applicable to these cases. These points, which are points of law, embrace propositions which are not disputed by us, and which, as we pointed out at the oral argument, are in no wise applicable to these appeals. Let us take up these points in their order.

The first point is as follows (p. 36):

> "An injunction pendente lite must be supported by verified statements, as to essential facts, positive, certain and free from conclusions."

From this it would readily be inferred that an injunction had been granted upon a bill that did not contain verified statements in a positive form.

The answer to this is found by quoting from the opinion of Judge Bledsoe (Case No. 2539) as follows (page 41):

> "The bill in equity as filed contains much matter that seems to be immaterial, much that is purely 'epithetic,' to use an expressive phrase, and a great deal averred upon information and belief, and not positive. *With respect to this latter, the Court feels that it should not, of course, consider it upon this order to show cause,* because of the fact that under the law the complainant, to be entitled to positive relief at this juncture, and in advance of a hearing, must base his request for such relief upon positive allegations. Laying out of consideration, however, the matters referred to above, it may be said, *that certain facts are stated with such positiveness and cogency as that they fall within the realm of indispute upon this hearing.*"

The Judge then summarizes the positive allegations of the bill, and concludes that these positive allegations warrant an injunction.

The second point urged by counsel is as follows (p. 38):

> "Where a court's action in granting an injunction pendente lite is based upon a verified statement of facts a material one of which is not only uncertain, but is on information and belief, and not positive, such action rests upon an erroneous hypothesis of pertinent facts."

Here again it is to be inferred that an injunction was grounded upon a bill containing allegations made upon information and belief. The quotation from Judge Bledsoe's opinion given *supra,* however, disposes of this contention.

The third point urged by counsel is as follows (p. 40):

> "Asserted equity in a verified bill, stated in terms sufficient to justify the affirmative use of the court's discretion on motion for injunction pendate lite, is overcome, on motion to dissolve such injunction, by affidavits supporting the motion which contain positive, clear, and unequivocal denials of material allegations in the bill. Particularly is this true where material allegations in the bill are defective for want of positive averment, as well as for want of clearness, or because made up of the conclusions of the pleader."

The answer to this point will be more particularly shown *infra*. In passing, however, it may be said that there are no positive, clear or unequivocal denials of *all* the material allegations of the bill, but, on the contrary, certain definite admissions are made. Not alone were these admissions made, but the rule itself, referred to by counsel, is one going to the extent of holding that *all of the equity* of the bill must be denied. Now, the appellants themselves, claiming as they *do through the same source of title as the complainant claims,* could not deny all the equity of the bill without stating themselves out of court.

The fourth point urged by counsel is as follows (p. 42):

> "Where asserted equity in a bill is wholly overcome by contradictory affidavits on motion to dissolve an injunction, it is an improvident exercise of a court's legal discretion to deny dissolution."

The answer to point three is applicable here, for the affidavits so far from wholly overcoming the allegations of the bill, as we have previously pointed out, admit the essential allegations thereof, *insofar as the question of the right to an injunction is concerned.*

The fifth point urged by counsel is as follows (p. 41):

> "There has been reversible error where a court in granting or continuing an injunction pendente lite—
>
> (a) Has relied upon an erroneous hypothesis of pertinent facts, or—
>
> (b) Has relied upon an erroneous hypothesis of pertinent law, or—
>
> (c) Has improvidently exercised its legal discretion."

This point is urged as if it were a proposition peculiarly applicable to this case. It is merely stating the proposition that where a lower court has committed an error of law, an appellate court will correct that error upon appeal. This point of law, of course, arises in every case, and, to be of any value here, must be taken upon the predicate that the

decision below is incorrect, which is to assume the point at issue.

It is quite apparent, therefore, that the entire case of the appellants here rests upon propositions of law that nobody disputes, but none of which is applicable to the facts of this case; and this being so, it is apparent, without any further discussion of the record, that there is no ground whatever for the appeals here, and that the orders appealed from should be affirmed.

These preliminary points being out of the way, the following is devoted to an abbreviated discussion of the points urged by us at the oral argument and referred to *supra*.

I.

BRIEF OF ARGUMENT.

THE VERIFIED COMPLAINTS FULLY WARRANT THE INJUNCTIONS PENDENTE LITE.

The injunctions were properly granted upon several grounds, among which we specify as follows:

1. The bill seeks to prevent a cloud upon title.

It will be conceded that where equity will interpose to remove a cloud upon title, it will, by injunction, prevent the casting of a cloud. The authorities cited in our former brief on this point are conclusive. (Appellant's Brief, p. 7.)

By Sec. 2324 of the Revised Statutes of the United States it is provided that where one co-locater of a mining claim fails to contribute his proportion of the assessment work, for any given year, his co-locater who has performed the labor or made the improvements, may, *at the expiration of the year,* forfeit his interest by giving him the notice therein specified.

> "If" says the statute, "at the expiration of ninety days after such notice in writing, or by publication, such delinquent shall fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures."

The right of forfeiture for failure to contribute his proportion of the expenditures made by a co-owner is given by this statute and by this statute alone. It does not give the right to a forfeiture where these expenditures have not been made and it surely does not give the right of forfeiture if the owner had moneys belonging to his co-owners with which to do the work. And the important point is, that the forfeiture exists by virtue of the Federal Statute only.

The cloud that is sought to be cast upon the title of the co-owner here results from Sec. 1426-0 of the Civil Code of this State. This section provides that when the co-owner has given the notice required by Sec. 2324, Revised Statutes, an affidavit of service may be attached to such notice, and both may be

recorded in the office of the County Recorder where the property is situate within ninety days after the giving of the notice. The section then provides:

> "The original of such notice and affidavit, or a duly certified copy of the record thereof, *shall be prima facie evidence that the delinquent mentioned in Sec. 2324 has failed or refused to contribute his proportion* of the expenditure *required* by that section, and of the service of publication of said notice . . ."

In a subsequent part of the section it is provided that if the co-owner shall contribute his pro rata of the expenditures, and *"also all costs of service of the notice required by this section,"* the other owner shall deliver a writing to that effect, under a penalty if not done. If he shall refuse to do so, the delinquent, with two disinterested persons who have personal knowledge of the contribution, shall make an affidavit of the fact, which shall be prima facie evidence of such contribution.

The cloud which is cast upon the title of the co-owner by virtue of the recording of this notice and affidavit, is plain. *By virtue of the statute, the burden of proof has been shifted, and the recording of such affidavit and notice makes out a prima facie case that the work has been done.*

Now, the injunction in this case is to prevent the creation of this cloud upon the title, for the following reasons:

(a) The appellant Pack did not pay for the work during the years 1911 and 1912, as alleged. It would be a singular thing to permit the creation of this cloud upon the title of the appellee,—the cloud going to the extent of making out a prima facie case against him,—when, in point of fact, the work for which contribution was sought, had not been paid for.

The opinion of the lower Court on this point is, we think, all that it necessary to cite (p. 42, No. 2539):

> "Plaintiff then alleges that the said Pack did not expend, or cause to be expended, of his own money, during the years 1911 and 1912, or at any other time, the sum of $5,600, of which the said $700 was the one-eighth part, upon or for the benefit of said placer mining claims, or at all."

And further (p. 43):

> "At this time the Court must assume them (meaning the allegations) to be true, because no affidavit or answer in opposition to or in explanation of them, has been presented by the defendants."

And the rule the court then announced would appear to be indisputable (p. 43):

> "It would appear that the defendants have no right to claim or exact a forfeiture, as

against the plaintiff, for his failure to contribute his share of the assessment work, and that the proceedings on the part of the defendants, leading up to the service of the notice of forfeiture, and in the recording thereof, are substantially a nullity, insofar as they seem to have effected a divestiture of plaintiff's undivided interest in and to the mining property in question."

(b) The second ground for the injunction seeking to prevent the casting of this cloud arises from the fact that at least $2,836 was contributed by the plaintiff and his co-locaters to the appellees with which to do the assessment work. The allegation of the bill of complaint in this regard was distinct and positive, and it was, of course, binding upon the lower Court when no affidavit or answer in opposition thereto was made. It is not necessary to cite authority to the point that a court of equity will restrain a party from declaring a forfeiture against another because of the non-payment of moneys, when the former had moneys belonging to the latter with which to make the payment.

The following, in those cases in which an affidavit was filed, appears to be the facts with respect to this contribution, from the defendant's own standpoint: (Case No. 2540, p. 71.)

"That affiant alleges that the sum of $1,000 [erroneously printed $100 in the record] alleged in said Bill of Complaint to have been paid by

> one Henry E. Lee as the agent and representative of complainant and his co-locators to affiant for complainant and his co-locaters, was actually paid to affiant on or about the 18th day of January, 1912, that at the time said sum was so paid to affiant, said Lee was indebted to affiant in a large sum, to wit, a sum in excess of $1,000, that affiant elected to and did treat said payment of said $1,000 as a payment on account of said indebtedness of said Lee to affiant, that affiant does now [erroneously printed not in the record] elect to so treat said payment of said $1,000 as a payment on account of the indebtedness of said Lee to affiant; that said sum of $1,000 was not advanced for or on behalf of the complainant and his co-locators herein or any or either of them, but, so far as this affiant knows and to the best of his knowledge and belief, solely on behalf of said Lee himself."

Here we have an admission that a thousand dollars of the $2,836 referred to, was paid. The excuse offered is that at the time the contributor was indebted to the appellee in a greater sum that a thousand dollars; that he elected to and did treat this payment of a thousand dollars as a payment on account of that indebtedness, and

> "that affiant does *now* elect to so treat said payment of said $1,000 as a payment on account of the indebtedness of said Lee to affiant."

The fact that the affidavit alleges "that affiant does *now* elect to treat said payment as a payment

on account of said indebtedness," removes any question as to its application in satisfaction of the alleged indebtedness *at the time it was made,* with the knowledge of the appellee; and the failure to notify the contributor at the time the thousand dollars was paid that it would be applied on account of this indebtedness, and not for the purpose for which it was given, was, of course, a fraud. If, for example, one of two persons holding a mining claim contributed to his co-locater a sum of money with which to do the assessment work, the contributee could not as was held in the Court below, appropriate this money for any other purpose, unless at the time he received it he notified him that he intended to do so. Such moneys, when given for such a purpose, must be appropriated to that purpose. The affidavit here is barren of any allegation or assertion that when this thousand dollars was paid, the appellant notified Lee that he intended to apply it upon account of his personal indebtedness, and would not use it for the purpose for which Lee gave it, and the fact that the affidavit states that the affiant "does now," after suit brought, seek to so apply it, removes this question from any doubt.

As to the balance of $2,836, the sum of $1,836, the facts are equally clear. The affidavit of appellant Pack in case No. 2540 is not complete on this subject; and in order to ascertain the exact facts, the record in Pack v. Carter, No. 2538, pages 93 to 95,

must be examined. From these affidavits it will appear that prior to the month of December, 1911, Henry E. Lee asked affiant to endorse his note, in order that he, Lee, might obtain a loan. This request Pack refused. Thereupon Lee requested him to give him a written acknowledgment of indebtedness, in order that he might obtain a loan on his own promissory note, to be secured, however, by an assignment of said written acknowledgment; that he requested this written acknowledgment of indebtedness to be given in an odd sum, in order that a possible lender might not suspect that the same had been given as an accommodation:

> "That affiant acceded to the said request of said Lee, and gave said Lee a written acknowledgment of indebtedness in the sum of $1,836, *for the purpose of enabling said Lee to repay affiant the amount of said Lee's indebtedness to affiant;* that affiant received no consideration for the said written acknowledgment, either past or present; that said Lee was unable to procure a loan on the security of said written acknowledgment; that the same has never been negotiated, and is wholly without consideration of any kind whatsoever or at all."

(p. 94, 95 Pack v. Carter, No. 2538.)

In Pack v. Thompson, No. 2540, the facts in regard to this same matter are stated in a somewhat different form, as follows:

> "That affiant acceded to the said requests of said Lee and gave Lee a written acknowledg-

> ment of indebtedness in the form *of an 'I. O. U.'* for the sum of $1,836, for the purpose of enabling said Lee to repay affiant the amount of said Lee's indebtedness to affiant."

From these facts it appears that Lee was indebted to affiant, and that the I. O. U. referred to was given to him for the purpose of enabling him, Lee, to borrow money with which to repay that indebtedness.

This makes the situation very clear. Pack acknowledged, in the form of an I. O. U., the indebtedness to Lee in the sum of $1,836; he admits that that evidence of indebtedness is outstanding; he alleges a want of consideration. Upon whom rests the burden of proof? Obviously upon Pack. *Had Lee, for example, sued upon the I .O. U., the production of the written instrument would make out his case, and if the defendant offered no further evidence, judgment would follow in his favor.*

This being the situation, the balance of proof is clearly in favor of the appellee; and the rules with respect to injunctions require that the cause should be determined according to the balance of proof. It will be noted in passing, that from appellant's own affidavit, a consideration for the instrument is shown; for it is alleged that this I. O. U. was given in order that Lee might borrow money to repay an alleged indebtedness to appellant. Obviously, as between Lee and Pack, there was a consideration for this instrument. It is alleged that Lee did not obtain the money.

Nothing in the affidavit discloses that he is not rightfully in possession of this instrument now, or that he has not the right still to borrow money upon it, or that the time for his performance under the agreement between them has elapsed.

2. An injunction pendente lite was properly granted in this case to prevent a multiplicity of suits.

This ground was set forth so clearly in our first brief on pages 8 to 9, upon the authority of McConnaughey v. Pennoyer, 43 Fed. 339, that any further discussion of it here is deemed unnecessary. (Appellee's Brief, p. 8.)

3. The accounting feature clearly warranted the granting of the injunctions.

This matter was likewise fully discussed on pages 14 et seq. of our opening brief, but something further on the subject may not be inappropriate.

By turning to the bill in case No. 2535, it will appear that the plaintiff alleges that Pack did not expend, during the years 1911 and 1912, the $5,600 therein referred to (p. 10), and that he did not expend, during either of those years, the sum of $100 upon each or upon all of the claims referred to. It will further appear that the notice of forfeiture (p. 41) did not in any way describe the character or nature of the pretended labor or improvements claimed to have been done, and that the plaintiff is

unable to ascertain definite information on that subject.

The complaint then alleges (p. 12):

> "That plaintiff is unable to ascertain from said pretended Notice of Forfeiture whether the said defendant Pack claims to have actually expended, of his own money or funds, in labor and improvements, or in labor or improvements, upon each of said placer mining claims, the said sum of $100.00, or the sum of $5,600.00 upon all of them, or any other sum or amount, or *whether the said defendant Pack claims to have expended such money in the transportation of men and supplies to Searles Borax Lake for the purpose of having done upon each and all of said placer mining claims the annual representation work for the years 1911 and 1912;* that plaintiff cannot ascertain from the said pretended Notice of Forfeiture whether the amounts claimed to have been expended by said defendant Pack of his own money or funds upon said placer mining claims, or upon any of them, if he ever expended any money at all thereon, was the value of $100.00 for each claim, or of the value of $5,600.00 for all, or whether such labor and improvements, or labor or improvements increased the value of each of said claims in the sum of $100.00, or the value of them all in the sum of $5,600.00, or whether said pretended labor and improvements, or labor or improvements tended in any way to develop any or all of said placer mining claims, or increased or aided in availability for taking ores or minerals from said claims, or from any of them; that this

> plaintiff further alleges upon information and belief that the said defendant Pack, if he expended any of his own money or funds pretending to be for or in the representation of said placer mining claims, or any of them, for the years 1911 and 1912, expended a greater part or portion, or all of such money, *in the transportation of men and supplies to Searles Borax Lake, San Bernardino County, California, where said placer mining claims are located, as aforesaid,* and in furnishing and supplying food, wearing apparel, delicacies and luxuries to the men so transported to said Searles Borax Lake for the purpose of performing said representation work during said year upon said claims."

The affidavit of Pack in this regard does not contradict these allegations, but contains an admission of such importance that, although already quoted in our former brief, we deem advisable to quote again.

On page 64 of the record, Pack v. Thompson, No. 2540, the appellant Pack says:

> "Affiant alleges and affirms that he did pay out and expended of his own moneys during the year 1912 the sum of $4,400 in connection with *and for the purpose of procuring the performance of the annual labor upon the said forty-four placer mining claims hereinbefore referred to* and more fully described in the Bill of Complaint on file herein, which said sum affiant *believes* should be properly charged against and constitute a part of the value of, the annual assessment work for the year 1912 and which said sum affiant believes should be repaid and

> contributed to him by his said co-locators and that complainant herein should reimburse affiant for one-eighth of said sum."

Here is an admission by a failure to deny the allegation of the complaint that a portion of this $4,400 was for the transportation of men and supplies to Searles Borax Lake for the purpose of having the work done. And the counter affirmative statement is made, that the affiant *believes* that work and labor performed *not* on the property, should be charged up to his co-locater. It is, of course, well settled law that the only amount which a locater can exact from his co-locater for contribution, is for *work actually done or improvements actually made on the property,* and that this does not include the cost of transporting men. See Lindley on Mines, sec. 629, 3rd Ed.

This being the case, we have, upon the admissions of the complaint and affidavits, the right to an accounting; and we also know that there is included within the amount for which the forfeiture is claimed, an amount for which the appellant has no right to a contribution from the appellee.

It is a general rule that courts not only abhor a forfeiture, but this rule has particular application with respect to proceedings under the mining law. Thus, Lindley on Mines, Vol. 2, p. 1622, says:

> "The courts, however, hold that the statute is one of forfeiture, and should be strictly constructed.

In order, therefore, that the interest of a co-tenant may be forfeited it is essential—

1. That the relationship of co-tenancy exist.

2. *That the entire work shall have been performed by one or more of the contenants.*

3. That the delinquent co-tenant or his successors in estate has failed to contribute his proportion after service of personal notice by publication, as required by law."

And in Knickerbocker v. Halla, 177 Fed. 172, Judge Gilbert, speaking for this Court, said:

"First. The proceedings to forfeit the interest of the plaintiff in error and that of Lapiana were based upon their failure to contribute to the annual assessment work for the year 1902, done upon the claim by Webb, together with his partners, Butler and Ewing. Prior to December 16, 1902, Webb had no interest in the claim. On that date Halla executed to him a deed of an undivided one-sixteenth interest; the consideration therefor being the use by Halla of a cabin belonging to Webb, and the promise of Webb to Halla to do the assessment work on that claim and certain other claims for the year 1902. In pursuance of that contract, Webb and his partners, after December 16, 1902, performed the work. It is clear that the performance of the work under the agreement gave Webb no right to claim forfeiture as against any of the owners for failure to contribute to the expense thereof. He was fully paid by Halla for his work. He

was hired by Halla to do the work, and the conveyance which Halla made was his pay. Halla, having caused the work to be done, and having paid therefor, had the right to claim contribution and give notice of forfeiture; but neither Webb nor his partners had any such right."

II.

THE CLOUD UPON APPELLEE'S TITLE IS AGGRAVATED BY THE SHIFTING OF THE BURDEN OF PROOF SOUGHT TO BE EFFECTED BY THE CALIFORNIA LAW.

It will be noted that under the Federal Statute the burned of proof rests upon the co-locater seeking to forfeit out his adversary, to prove his case, and it will be further noted that this burden of proof properly rests there, for the reason that the law abhors a forfeiture. The effect of the California statute, however, is to shift this burden of proof to the other party.

Waiving for a moment the legality of the statute in this connection, it will be seen that this places the appellee in a very disadvantageous position. The recording of the notice and the affidavit makes out, under the California statute, a prima facie case; whereas, under the Federal statute, the burden of proof would rest upon the proven claim of the appellant. See Hammer v. Garfield M. & M. Co., 130 U. S. 291; Harris v. Kellogg, 117 Cal. 484-489. This

prima facie case could only be overcome by proof, and therefore, as held by Judge Field in the case quoted from by Judge Bledsoe (record, 2540, p. 47), a bill to restrain the creation of a cloud upon title is eminently proper.

Moreover, the State statute, in some respects, conflicts with the Federal law. Thus, the Federal law, which alone gives rise to the forfeiture, states that the money must be paid at the *expiration* of ninety days; the State law requires it to be paid within ninety days.

The aggravated character of this cloud upon the title is further illustrated by the fact that the California statute shifts the burden of proof upon the filing of an unverified statement in the Recorder's Office. Neither perjury, nor any other legal consequences of false statement in this regard, flow from it; the only legal consequence flowing from the recording of an unverified statement in the Recorder's Office is, that the adverse party is bound to pay the demanded sum of money, or be forfeited out.

When, therefore, it appears, as here, that (a) some of the money claimed to have been expended was not expended on the mining claims at all; (b) that a thousand dollars of the co-locaters money was in the hands of the forfeiting claimant with which to do the work, and (c) that another sum of money is admittedly due from the co-locater to his adversary for the purpose of being applied towards the contri-

bution, it is too plain for argument that a court of equity should and will restrain the creation of this cloud upon title.

The question propounded by the Presiding Judge to counsel at the oral argument is an apt illustration in this connection. If we are not entitled to this measure of relief, what relief have we? *Is there any rule of law that requires us to pay money that we do not owe?* Is it a plain, speedy and adequate remedy at law for one who, for that matter, may not have the money, to be compelled to pay to his adversary, *money that he does not owe,* with the privilege of recovering it back, as claimed by counsel at the oral argument? Has a court of equity no right to stop the imposition of a forfeiture for the non-payment of money, when the money in fact was not due or owing? These questions seem to us to answer themselves.

III.

THE AFFIDAVITS PRESENTED BY THE MOVING PARTIES SHOW CONCLUSIVELY THAT THE INJUNCTIONS WERE PROPERLY GRANTED, AND THAT THE MOTIONS TO DISSOLVE THEM WERE PROPERLY DENIED.

1. The appellants cite two cases from this circuit to the effect that where the affidavit or the answer deny the allegations of the bill, the restraining order or injunction should be dissolved. In the first case,

Woodside v. Tonopah & Goldfield Railroad Co., 184 Fed. 358, Judge Morrow refers to a denial of "*all of the equities* of the complaint," and in the second case, City of Sacramento v. Southern Pacific Co., 155 Fed. 1022, Judge Van Fleet notes that the answer, under oath, "denies *all the material allegations* of the bill on which the complainant's asserted equity rests."

These two cases are against appellants' contention, for the reason that the affidavits, as we have shown, do not deny all the equities of the bill, but expressly admit all of the essential equities insofar as the injunction is concerned.

2. The appellants likewise cite Lucas v. Milliken, 139 Fed. 816. The application of this case is chiefly in point against them; for it is there said:

> "The general authority of courts of equity to grant injunctions pendente lite to preserve the subject of the controversy until opportunity is given for full investigation, is a power in aid of justice, and most beneficial."

If the *status quo* here is not preserved pending the determination of the main issue, it will be observed that the appellants will change it greatly to the disadvantage of the appellees, and in such way as to greatly interfere with the right of the Court to enforce that equity, which, in the fact of the rec-

ord, the complainant is entitled to preserve. This itself would warrant the granting of the injunction. Moreover, the rule is well established that the Circuit Court of Appeals will rarely, in advance of a final hearing, review the exercise of the lower Court's discretion in granting or refusing an injunction; nor will it review the lower Court's determination of any question arising upon conflicting affidavits; and rarely will it disturb the status quo until final hearing. See the cases cited in 1 Foster's Fed. Prac., sec. 238, p. 762-3 (4th Ed.).

3. At the hearing some comment was made upon the affidavits presented in the case. We have already referred to certain admissions found in these affidavits, which are conclusive, and in favor of the complaint. There were, however, one or two matters briefly referred to at the argument, and which will be briefly referred to here.

(a) If we turn to the record in Case No. 2540, Pack v. Thompson, we shall find that S. Schuler, the assignor of the appellant Joseph K. Hutchinson admits (p. 74), that on or about the 25th day of December, 1913, she made a deed of conveyance to one J. A. Shellito of all her interest in and to the claims. This deed, she says, was

> "not to be delivered to the grantee named therein, until certain conditions to be performed by the said grantee named therein, for and on

> behalf of affiant, had been fully performed; that many of such conditions were impossible of fulfillment and performance within a period of many months after the date of said deed; that other of the said conditions were to be performed and fulfilled by the said Shellito in favor and on behalf of affiant immediately upon the signing and acknowledgment of said deed."
> (pp. 74-75.)

She then refers to the fact that this deed was to be placed in the hands of the Security Trust & Savings Bank,

> "upon the fulfillment and performance of all said conditions . . . None of the conditions which were conditions precedent to the delivery by the said Security Trust & Savings Bank as escrow holder for affiant of said deed, has ever been fulfilled or performed by Shellito, or any other person, whomsoever."
> (p. 75.)

None of these conditions is specified, why they were impossible of fulfillment or performance, or within what period of time it would be so impossible to fulfill or perform them, is not stated; what the other conditions were that were to be performed and fulfilled, upon the execution and acknowledgement of the deed, what the terms of the escrow were upon which the deed was placed in the Security Trust & Savings Bank, are not stated.

Obviously, the sworn allegations of the grantor of the deed that it was delivered upon certain conditions, that many of these conditions were impossible of performance, that other of the conditions were to be performed, and that none of them was performed, are not binding upon a United States Circuit Court of Appeals.

(b) The affidavit then alleges that on the 14th day of January, 1914 (p. 76), she made, executed and delivered a deed of this same interest, after having made this previous deed to Mr. Shellito, to Joseph K. Hutchinson. She then says as follows (p. 77):

> "That prior to the said execution of the said deed to said Hutchinson, and after the said making, signing and acknowledging of said deed to said Shellito, affiant stated all of the facts of the case to her attorney, one Ezra W. Decoto, Deputy District Attorney of the county of Alameda, state of California, and thereupon and after said statement of all of the facts of the case by affiant to the said Decoto, the said Decoto advised affiant that she could legally, and without liability, or without breach of any duty owed by her to the said Shellito, or to anyone else, make, execute, and acknowledge the said deed to said Hutchinson; that thereafter and in the presence of the said Decoto, and acting upon his advice, the said Schuler made, executed, acknowledged and delivered the said deed to the said Hutchinson;

That at no time prior to the execution and delivery of said deed did affiant tell said Hutchinson, nor did her said attorney tell said Hutchinson, nor did either affiant or her said attorney in any way whatsoever notify the said Hutchinson that affiant had made, signed and acknowledged said deed to said Shellito, prior thereto, and on or about, to wit: the said 25th day of December, 1913, or at any other time, or at all;

That for and in consideration of the said conveyance by affiant to said Hutchinson, and at the time of said conveyance, and as a part thereof, said Hutchinson paid to affiant, and affiant received and accepted from said Hutchinson, a certain sum of money in cash; that said Schuler made and completed said sale to said Hutchinson of her said interest, in good faith, and without intention to, by the said sale, defraud or injure anyone whomsoever."

It is very plain that affiant was troubled in mind at the time she contemplated making this second deed, so much so that she consulted a deputy district attorney. Whether she did this because she was aware of a statute of the State of California which makes it a felony to deed property twice (Penal Code, sec. 533), or whether she pursued this course in order to obtain proper legal advice as to her conduct, is not clear. The candid reader would think it strange that an assistant district attorney, thus consulted upon so important a matter, should permit the execution and delivery of the second deed, delivered as stated *in his presence,* with-

out saying anything whatever to the grantee as to the existence of the prior deed. However this may be, a matter going to the weight of the evidence or the probability of its truth, the real point is, that *the advice of a deputy district attorney given* upon an undisclosed set of facts, is not binding upon a United States Circuit Court of Appeals.

(c) If now the Court will turn to case No. 2538, Pack v. Carter, it will find, beginning on pages 57 to 62, certain telegrams passing between Joseph K. Hutchinson and the administrator of the estate of one of the assignors of the appellee. In this case also, the assignor and his wife had made a deed of his interest prior to his death, which has passed to the appellee. This interest is sought to be acquired, as appears by that affidavit, by the appellant Hutchinson here.

The whole affidavit in this regard, beginning on page 57, to page 62, is worthy, we think, of serious consideration by this Court.

It is therefore respectfully submitted that the orders appealed from should be affiirmed.

R. P. Marshall
H. L. Clayberg
Jno. B. Clayberg
Welles Whitmore

Solicitors for Appellee.

APPENDIX

The following is a copy of Judge Bledsoe's opionion upon the hearing of the motion to dissolve the injunction.

The COURT: I think that every practitioner realizes that when the Court makes an order to show cause why certain relief should not be granted to the other party, on the return day of the order he should show all the cause he may have. That is the purpose of giving him that opportunity. I certainly am not going to encourage a practice which will enable a party to show part of his cause on one day, and then on another day show another cause which he should have shown on the return day. It has a tendency to trespass upon the patience and good nature of the Court, if I may be permitted to indulge in that expression, and I do not believe it is the kind of practice that should be encouraged. That is all I have to say about that, because I assume from the statement made as to the facts of the case, that counsel acted in good faith. He no doubt believed that his objections by way of demurrer, so to speak, to the complaint, were well taken. The Court disagreed with him. That was not unexpected. The Court has to disagree with somebody. And having been thus illy advised, if I may use that phrase, having been content to meet the order to show cause with an issue of law only, it seems to me they ought to take their medicine, and either appeal, or say that the determination of the only issue tendered was right.

As I stated a moment ago, I have never felt, in my consideration and determination of matters similar to this, that there is a hard and fast rule to the effect that where the equitites of the case presented by the Bill of Complaint are absolutely met by equally positive asseverations on the part of the defendant, that the Court would thereby be required to deny any relief in the way of restraint pendente lite. That would be a very persuasive argument to the Court, that no relief should be granted. It would raise considerable doubt as to the ability of the complainant to recover, ultimately. And, in the event of testimony or proof introduced on the part of the defendant equal to that of the complainant, it would be the duty of the Court to find for the defendant, of course. Because, in all these contentions the burden is upon the plaintiff by a preponderance of evidence to make out a case to entitle him to relief, all presumptions being in favor of the defendant, that he has done the things required of him to measure up to the duty enjoined upon him by law. And, in the event that the plaintiff fails by a preponderance of the evidence to show the stronger case, he should fail to recover in obtaining an injunction as well as any other relief. That frequently happens. When it is equally positive on both sides, the Court is compelled to find for the defendant. But I have always felt in the consideration of matters similar to this, that the Court should rather base its definite

conclusion and mold its interlocutory decree on the question of the probability of injury. Is it more probable, considering all the facts of the case, and giving the proofs adduced on each side the weight to which they are entitled—is it more probable that the plaintiff will suffer injury if the status quo is preserved than the defendant? If so, irrespective of the use of a yard stick in determining where the truth lies and basing the judgment on the elasticity which the defendant's conscience may permit him to assume in framing his answers under oath, and instead of using that sort of an arbitrary standard, the Court ought to feel, and this Court always has felt, that it would endeavor to measure the probabilities from the facts. And if the probabilities are that the plaintiff will suffer more injury than the defendant, or that it will be more injurious to the plaintiff than to the defendant, if the status quo is preserved, the Court will make his interlocutory award accordingly.

In this case there will be conflict in the proofs when they are presented. There is a good deal of talk of conspiracy and confederation, and such as that, none of which I take any stock in, because it is not alleged in such a manner as to attract the attention of the Court in that behalf. It does appear, however, as a positive allegation, that the defendant is not entitled, as of right, at this time, under the apparent probabilities, to claim a forfeiture as

against the plaintiff, because of moneys expressly contributed by the defendant, and, if they were so expressly contributed for that purpose I am inclined to believe that the defendant would have no right to elect that they should be used for some other purpose, and particularly in view of the fact that he does not say that he elected at that time, but says he elected that, maybe, day before yesterday. It says: "and affiant elected and did treat said payment," etc. If he intended that in good faith, it should have been communicated to the plaintiff at that time. If a man pays another a sum of money upon a debt that is made up of a number of items running over a long period of time, the payee has a right to elect what item to credit the payment to. But I apprehend that it has not yet been held that if one pays another to whom he is indebted money for a certain definite fixed purpose, wholly disconnected with the indebtedness, that the payee has a right, arbitrarily, to elect to credit that payment upon the indebtedness and refuse to credit it upon the purpose for which it was actually paid and turned over. I know of no such authority, and it does not commend itself to me on reason or principle.

There is some considerable murkiness in the atmosphere with respect to the title to the properties. Who owns them? Who has them in possession? I do not pay very much attention to that; I do not think it is vital here, and there is much of it

in doubt in the Court's mind as to where the truth and justice lie in that respect.

There is sufficient in the case, however, to cause the Court to believe that there is greater probability of injury to the plaintiff from the enforcement of this forfeiture than there could be to the defendant by a restraint of that enforcement. If the filing of this affidavit be enjoined at this time, then there can be no enforcement of the forfeiture upon the record, and the Court, when it comes to try the case, can then decree in whom the title to the property lies. If the defendant is entitled now to a forfeiture under the law, the Court will decree him that forfeiture when it hands down its judgment, and the defendant will not need to file any affidavit. He will have a forfeiture, and that will be embraced in the decision of this Court, which I am frank to say will be of considerable higher standing and integrity and greater in force and efficacy than any affidavit of forfeiture he could file in the recorder's office. It will be a decree that the plaintiffs have forfeited whatever title they had, and that will be determinative of the question of forfeiture and the question of title to the properties here involved. On the other hand, it would not be fair in this proceeding that the plaintiff should be permitted pending the conclusion of the injunction proceedings to convey any title to this property, or in any way, in the event that it should be determined hereafter that defend-

ant was entitled to a forfeiture—that the right then accruing to the defendant in view of that determination should be embarrassed at all by any action or conduct or conveyance, or attempted conveyance, of the property here, which otherwise would be declared to be forfeited.

So, the Court will make this kind of an order. It will deny the motion to vacate the temporary restraining order in the case last coming before the Court, and it will deny the motion to vacate the order for injunction pendente lite heretofore issued, and, as a part of that order, it will enjoin plaintiffs in this case from making, executing, delivering or in any way conveying the title to these properties pending the determination of the case by this Court, and to hold this question absolutely in statu quo. An appropriate order will be drafted by complainant's counsel.